Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

EXPEDITED ACTION REQUESTED - FINAL DECISION MUST BE RENDERED BY SEPTEMBER 17, 1999

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In the Matter of	)	
Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264
Horizontal Ownership Limits	)	
In the Matter of	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 98-82
Review of the Commission's Cable Attribution Rules	)	

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TO: The Commission

MOTION TO VACATE STAY OF ENFORCMENT OF HORIZONTAL OWNERSHIP LIMITS

Of Counsel:
Randi M. Albert

Law Student Intern:
Anna Medina
New York University Law School

Andrew Jay Schwartzman
Harold Feld
Cheryl A. Leanza

MEDIA ACCESS PROJECT
1707 L Street, NW
Suite 400
Washington, DC 20036
202-232-4300
Counsel for CU, *et al.*

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TO: The Commission

MOTION TO VACATE STAY OF ENFORCEMENT OF HORIZONTAL OWNERSHIP LIMITS

In this motion, Consumers Union,[1] Consumer Federation of America[2] and Media Access Project[3] ("CU, *et al.*") ask the Federal Communications Commission ("Commission" or "FCC") to vacate in its entirety the Commission's voluntarily-imposed stay of Section 76.503 of its rules. These "horizontal ownership" provisions limit how many subscribers may be served by any one cable television system operator.

[1]Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education, and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers.

[2]Consumer Federation of America is the nation's largest consumer advocacy group, composed of over two hundred and forty state and local affiliates representing consumer, senior citizen, low-income, labor, farm, public power and cooperative organizations, with more than fifty million individual members.

[3]Media Access Project is a non-profit public interest telecommunications law firm which promotes diversity and competition in the marketplace of ideas on behalf of consumer, civil rights, civil liberties and other citizens' groups.

Expedited relief is requested, as CU, *et al.* and other members of the public face immediate and irreparable harm from continued non-enforcement of the horizontal ownership rules, especially after September 17, 1999, the deadline for filings in this matter. At any time thereafter, the Commission could act upon the pending application of AT&T Corp. for transfer of control of MediaOne Group, Inc.

INTRODUCTION AND SUMMARY

This motion is necessitated by AT&T Corp.'s pending request for FCC approval of a transaction which would combine its TCI cable television properties with the cable systems now owned by MediaOne Group, Inc. If approved, the combined entity would control cable television ownership interests that would be more than twice as large as those permitted under the currently-stayed rules.

The breadth of the ownership interests which would be joined by the proposed transaction are analyzed in detail by Dr. Mark Cooper in the attached report entitled ***BREAKING THE RULES: AT&T'S ATTEMPT TO BUY A NATIONAL MONOPOLY IN CABLE TV AND BROADBAND INTERNET SERVICES.*** Dr. Cooper concludes, *inter alia,* that the combined entity would have "just over 57 percent of the Multichannel Programming Market. He finds that "AT&T will have just under 35 million subscribers. This would give it almost 50 percent of the cable TV market." He argues that AT&T seeks to obtain "horizontal concentration [which] rises to a level that is unprecedented in the industry. This creates a unique and new barrier to entry in the horizontal dimension...."

There is no judicial impediment to reinstitution of these rules. The Commission has forcefully defended their statutory and constitutional validity, most recently in a brief filed just four days prior to this motion.

Failure to give immediate effect to these rules will cause immediate and irreparable harm to CU, *et al.* and their members. They will be subjected to monopoly power in their purchase of video programming and their choice of video providers. Their access to diverse programming, an entitlement provided by the First Amendment, will be diminished.

There is more. The fact that AT&T will use its cable infrastructure to offer broadband services provides powerful new reason to impose limits on cable subscriber reach at this time. The already highly-concentrated cable television industry has the incentive and ability to abuse its broad subscriber reach to impede entry of new competitors. *Cable Television Consumer Protection Act and Competition of 1992* ("1992 Cable Act"), Sections 2(a)(4)-(5), 106 Stat. 1460.

Finally, the need for prompt action to lift the Commission's stay is exacerbated by AT&T's contemptuous refusal to provide basic information about its actual ownership interests. Central to creation of any ownership limit is a definition of which debt and equity interests should be considered "attributable" for calculating ownership. Stating its belief that the Commission's ownership "attribution" definitions are unlawful and (according to AT&T's General Counsel) "absurd,"[4] AT&T has not disclosed its current audience reach under the Commission's attribution rules, or what its reach would be if the MediaOne transaction were approved. Absent immediate action by the Commission, this critical information will be unavailable to the public, competitors and the Commission during consideration of the merger application.[5]

The harm CU, *et al.* face is imminent. Unless the 1993 stay order is lifted, the Commission will be free to act upon AT&T's application after September 17, 1999, the date by

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[4]AT&T Household Reach to be Issue in MediaOne Merger Review," *Communications Daily*, May 10, 1999, p.3.

[5]As discussed below, CU, *et al.* believe that the Commission's stay does not shelter AT&T from disclosure of these data. AT&T evidently believes otherwise. Thus, if the Commission is not disposed to lift its stay, it should at the least clarify the scope of AT&T's filing obligation.

which all filings concerning the merger must be completed. Continuing non-enforcement of the horizontal ownership rules materially affects the outcome of issues in this case, and would deny the public of statutory protection from anti-competitive abuses. Continuing uncertainty over the horizontal ownership rules also inhibits competition from existing and potential competitors.

I. BACKGROUND

In 1992, Congress gave the Commission a deadline of one year within which to adopt regulations restricting cable television system mergers. Then-Senator Gore joined 73 other Senators and 308 members of the House in voting to override President Bush's veto of the bill that included this mandate, and to put the 1992 Cable Act into law.

The title of the legislation demonstrates the purpose of the cable television subscriber limits directive: to protect consumers and promote competition. In 47 USC §533(f)(1), Congress directed that the FCC "shall ... conduct a proceeding ... to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers...." *Id.* Thus, among other things, it instructed the FCC "to ensure that no cable operator or group of operators can unfairly impede the flow of video programming ... either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size." 47 USC §533(f)(2)(A). It also told the FCC "to ensure that cable operators ... do not favor ... [affiliated programmers] ... or ... unreasonably restrict the flow of video programming...." 47 USC §533(f)(2)(B).

Under the direction of then-Acting Chairman Quello, the Commission met a Congressionally prescribed time limit by unanimously voting to issue rules imposing a cap of 30% of the nation's cable TV homes ("homes passed") in September, 1993. However, prior to that time, a federal court declared this statutory provision. *See Daniels Cablevision, Inc. v. United States of America*, 835 F.Supp. 1 (D.D.C. 1993).

The judge in the *Daniels* case did not enjoin enforcement of the horizontal ownership provisions. In fact, on his own motion, he issued an order staying the effect of his decision, thereby ***permitting*** the FCC to put these the horizontal ownership rules into effect. Daniels Cablevision cite. The FCC nonetheless voluntarily announced that it would not enforce these limits pending outcome of the government's appeal "to avoid potential confusion and uncertainty...."[6]

The existence of the stay was of little consequence for several years, as no cable operator was approaching the 30% cap. That has changed.

CU, *et al.* believe that it is now arbitrary and capricious for the Commission to fail to enforce limits on cable horizontal ownership at this time. The statute commands the Commission to do just that: it states that "[T]he Commission shall...prescribe such rules." Severe harm flows from this unlawful omission.

As to the constitutionality of the law, whatever doubt the Commission may have harbored about its validity has been resolved by several determinative Supreme Court and Appeals Court decisions. In its 1998 *Reconsideration Order, supra*, the FCC voted 4-1 to reaffirm them. Just four days prior to the filing of this motion, the FCC and the United States submitted their brief to the United States Court of Appeals for the District of Columbia Circuit in *Time Warner Entertainment Company, LP v. FCC*, No. 94-1035, defending the rules. As discussed below, the government's new brief points to numerous decisions issued since the 1993 District Court decision in *Daniels*, including the two Supreme Court decisions upholding the cable must-carry rules, as well as the D.C. Circuit's decision upholding other provisions of the 1992 Cable

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[6] *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, 8 FCC Rcd 8565, 8667 (1993)("*Second Report and Order*"). The Commission advanced no further explanation.

Act, and a more recent decision of the same court upholding the electronic publishing provisions of the 1996 Telecommunications Act. The federal brief also advances the view that the 1992 Act's horizontal ownership provision of the 1992 Cable Act on its face "impose[s] such slight burdens in furthering the government's interests that they could not possibly be deemed undue." Brief of the FCC and the United States in *Time Warner Entertainment Company, LP v. FCC*, p.17 (filed August 13, 1999). With respect to the rules implementing the statute, the brief argues that "the Commission responsibly exercised its judgment, taking into account the factors set forth in the statute...." Thus, it concludes, the "subscriber limit ... rules neither impose an undue burden on the free speech rights of cable operators nor transgress the statutory limits on the agency's discretion." *Id.*, p. 18.

II. CIRCUMSTANCES NECESSARY TO JUSTIFY CONTINUATION OF THE 1993 STAY DECISION NO LONGER PERTAIN

Unless the Commission can conclude that the circumstances justifying a stay are operative at this time, it must lift the stay it had previously chosen to impose.[7]

A. Criteria Governing Lifting of the Stay

Federal courts and the FCC have employed the so-called *Virginia Petroleum* standard to govern whether a stay of an administrative order is appropriate. *See Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.* 559 F.2d 841 (D.C. Cir. 1977); *Sampson v. Murray*, 415 U.S. 61 (1974); *Ambach v. Bell*, 686 F.2d 974 (D.C. Cir. 1982); *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669 (D.C. Cir. 1985). *Virginia Petroleum* also governs the

[7]As noted above, there is no judicial impediment to lifting the stay. In issuing its September 27, 1993, *Judgment,* District Court in *Daniels* stayed its enforcement pending appeal. That appeal is as yet unresolved, and the injunctive relief ordered by the District Court remains in abeyance. Thus, were the Commission to lift its stay of 47 CFR §76.503, the judicial stay would permit its enforcement.

lifting of stays.

The by-now familiar test consists of four factors. The party seeking to lift the stay must demonstrate (1) that the party who obtained the stay will not likely prevail on appeal, (2) that the party who obtained the stay will not be irreparably harmed by removing the stay, (3) that the removal of the stay will not adversely impact other interested parties, and (4) that it will be in the best interest of the public to remove the stay. *See Virginia Petroleum,* 259 F.2d at 925.

"The same considerations obtain where the issue is whether an injunction should be lifted or stayed." *Breswick & Co. v. FCC*, 75 S.Ct. 912, 915 (1955) (Harlan, J., Circuit Justice). The burden for issuance of a stay is on the moving party. This is a continuing obligation; if the movant cannot "show that [it] continue[s] to satisfy the stringent standards required for a stay ...," the stay must be lifted. *Resolution Trust Corp. v. Cohen*, 1994 WL 191734 (D.C. Cir.) By contrast, the burden of proof on opposing party "to show only that it had a 'colorable' claim,..." that conditions no longer justify the stay. *JB & LE Venture v. MONY*, 1998 U.S. App. LEXIS 4668 *6. *See In re Johnson*, 756 F.2d 738, 741 (9th Cir. 1985).

B. Likelihood of Success on the Merits

Although there may have been some doubt at the time the Commission adopted its voluntary stay of enforcement of the horizontal ownership rules, subsequent events make it quite likely that the 1992 Act and the Commission's rules adopted thereunder will sail through judicial review.

The case for upholding the Commission's rules is powerful, indeed. Certainty is not required. Rather, for immediate purposes, however, the only question is whether there is a ***substantial*** likelihood that 47 U.S.C. §533(f) or the rules implementing it will be invalidated. It does not matter if that the Commission ***might*** not prevail in this appeal. What does matter is that the Commission, joined by the Department of Justice, is on record that there is strong authority to uphold its horizontal ownership rules. Thus, in the Commission's publicly stated view, there is surely no ***substantial*** likelihood that these provisions will be finally adjudged unconstitutional or in excess of statutory authority. Hence, there remains no justification for leaving its stay in place based upon a likelihood of reversal.[8]

1. Constitutional Issues

All relevant Supreme Court and lower court decisions since *Daniels* show that the Commission will succeed on the merits of its pending appeal.

At the time that the *Daniels* decision was issued in 1993, there was little immediately relevant Supreme Court First Amendment jurisprudence with respect to cable television. The Supreme Court had on several occasions declined to address such issues. *See, e.g, City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1988)(remanding First Amendment issues for trial); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984)(resolving case on the basis of preemption issue not presented by the parties); *Century Communications Corp. v. FCC,* 835 F.2d 292, *clarified,* 837 F.2d 517 (D.C. Cir. 1987), *cert. denied*, 476 U.S. 1032 (1988); *Quincy Cable TV, Inc. v. FCC,* 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied,* 476 U.S. 1169 (1986).

Since that time, the Supreme Court has definitively established the First Amendment standards applied to cable television operators. *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622 (1994); *see Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 622 (1997). The D.C. Circuit has further refined that jurisprudence in the context of ownership and other struc-

[8]*Virginia Petroleum* dictates a balancing of the factors. Where there is little likelihood of reversal on appeal, the burden of establishing harm to the moving party, the absence of harm to other parties, and the public interest of a stay become correspondingly higher. "The necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors." *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d at 843. *See also Ambach v. Bell*, 686 F.2d at 980

tural regulations. *Bell South Corp. v. FCC,* 144 F.3d 58 (D.C. Cir. 1998), *cert. denied,* 119 S.Ct. 1495 (1999); *Time Warner Entertainment Co. v. FCC*, 93 F.2d 957 (1996), *reh'g en banc denied,* 105 F.3d 723 (D.C. Cir. 1997).

By 1998, when the Commission disposed of reconsideration petitions challenging the horizontal ownership provisions adopted under the 1992 Cable Act, there was powerful precedent supporting the validity of the law and the regulations promulgated thereunder. The Commission itself has argued to the United States Court of Appeals in asserting the constitutionality of the very rules here at issue, the horizontal ownership mandate of the 1992 Cable Act "impose[s] such slight burdens in furthering the government's interests that they could not possibly be deemed undue." Brief of the FCC and the United States in *Time Warner Entertainment Company, LP v. FCC,* p.17 (filed August 13, 1999).

2. Statutory Considerations

There is even less doubt as to the reasonableness of the FCC's exercise of its authority under Section 533(f). As articulated in the 1992 Cable Act *Senate Report,* the provision was a response to "special concerns about concentration of the media in the hands of a few who may control the dissemination of information."[9] The *Report* voiced worries that horizontal concentration might become "the basis of anti-competitive acts."[10]

The reasonableness of the Commission's action is underscored by the fact that, in large part responding to comments from the cable industry, the 30% cap the Commission finally adopted was higher than what was originally proposed. *See Notice of Proposed Rulemaking*, 8

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[9]Report of the Senate Committee on Commerce, Science and Transportation, S. Rep. No. 102-92, 102d Cong., 1st Sess. 32 (1991) ("*Senate Report*") at 32. The *Senate Report* warned that "media gatekeepers" could "slant information according to their own biases, or ... provide no outlet for unorthodox or unpopular speech...." *Id.*

[10]*Senate Report* at 33.

FCCRcd 210 (1992); *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCCRcd 6828 (1993); *Second Report and Order, supra.*

Fundamental to the 1992 Cable Act was the recognition that undue levels of horizontal concentration provide cable MSOs with "the market power to determine what programming services can 'make it' on cable." Congress analyzed the scope and impact of existing antitrust laws, finding that even at the more modest levels of concentration that existed at that time, Congress there was reason to be concerned "about concentration of the media in the hands of a few 'media gatekeepers' who could control dissemination of information."[11] Congress feared the resulting harm to consumers, stating that such concentration "could discourage entry of new programming services, restrict competition, impact adversely on diversity, and have other undesirable effects on program quality and viewer satisfaction."[12]

No better confirmation of the widespread recognition of the problems posed by excessive national market penetration could be possible than the testimony of John Malone, TCI's former Chairman, now a member of the AT&T Board of Directors. Under questioning of then-Senator Gore, Dr. Malone

> told the Committee that he believes some limits are appropriate to protect the public interest:
>
> > Senator GORE. Would you believe that there is some justification for the Congress putting a limit on the number of cable systems that a company like yours can own?
> > Mr. [*sic*] MALONE. Yes, sir.
> > Senator GORE. You do?
> > Mr. MALONE. Yes.
> > Senator GORE. Where do you think that limit ought to be?

[11] *Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking*, 13 FCCRcd 14462, 14478 (1998) (*"Horizontal Ownership FNPRM"*) (quoting *Senate Report* at 32).

[12] *Report of the House Committee on Energy and Commerce*, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 43 (1992) ("*House Report*").

> Mr. MALONE. I'm not sure. You know, it depends on how you count, I think, to some degree. But, you know, broadcasters right now I think can own 25 per cent of the market with VHF stations and up to 50 with UHF stations. ***Our technology is different. Clearly, some lower limits are in order for our industry.***

Senate Report at 33-34 (Emphasis added).

Taking this history into account the Commission clearly understood that, in adopting new and additional measures in the 1992 Cable Act, Congress wished to have it impose requirements which more stringent than those already in the U.S. Code. Thus, with respect to horizontal ownership, the Commission declared that "the diversity of information sources can only be assured by imposing limits on the ownership of media outlets that are ***substantially below those that traditional antitrust analysis would support***."[13] In establishing its 30% horizontal ownership cap, the Commission reasoned that this level "*limits the extent to which large cable MSOs can merge and result in one or two MSOs controlling local cable markets nationwide*.... The 30 [percent] limit also *reduces the likelihood of coordinated activity* between large cable MSOs in areas such as program purchasing...."[14]

The Commission's ownership "attribution" rules will also almost certainly withstand review.[15] The policy the Commission has followed comports with Securities and Exchange Commission rules and mainstream corporate legal scholarship as to the nature of corporate control. The attribution rules are identical to those traditionally employed for broadcast ownership. Thus, it is especially significant that on August 5, 1999, the Commission completed an exhaustive reevaluation of its broadcast ownership rules, and chose to make no significant

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[13] *Second Report and Order*, 8 FCC Rcd 8565, 8570-71 (1993). (Emphasis added.)

[14] *Horizontal Ownership FNPRM* at 14478-79 (emphasis added).

[15] CU, *et al.* will argue in the AT&T/MediaOne proceeding that the ownership attribution rules are ***not*** Commission's stay decision.

changes. *Report and Order in MM Docket 94-150*, FCC 99-207 (released August 6, 1999).[16]

C. Harm To AT&T

AT&T will not suffer significant harm in the event that the law is enforced. It has no entitlement to obtain certain FCC authorizations; for example, it must always establish that grant of Title III licenses are in the public interest. In the event that it can establish that full enforcement of the rules as applied to it would create undue hardship or otherwise be contrary to the public interest, AT&T would be free to seek and obtain a waiver of those rules. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("[A] general rule, deemed valid because its overall objectives are in the public interest, may not be in the 'public interest'" under all conditions.)

Nor would the denial of AT&T's application entirely preclude it from expanding its business. To the extent that AT&T argues that it seeks to use cable television facilities to deliver voice and data services, it (and its affiliated programming entities) can obtain circulation on MediaOne systems by purchasing access or by entering into partnerships or joint ventures with MediaOne or any new owner which might later purchase MediaOne's cable systems.

D. Harm to the Public

The Commission must approach the question of whether to leave its stay in place from the standpoint of the statute, which contains a non-discretionary command that it "shall" prescribe regulations imposing horizontal ownership limits. As it has become more clear that there

[16]While the Commission specifically stated that its decision would not preclude different treatment for cable ownership, *id.* at ¶161, the reasoning it employed is in most respects fully applicable to cable. For example, the Commission relied on "a growing body of academic evidence indicat[ing] that an interest holder with 5 percent or greater ownership of voting equity can exert considerable influence on a company's management and operational decisions." *Id.*, at ¶11. The methodology described therein would undoubtedly yield the same result for cable ownership.

is a valid legal basis for such rules, and as the likelihood that AT&T will far exceed limits which the FCC has already determined to be necessary to fulfill the public interest, the Commission must reassess its stay. Such reevaluation inevitably leads to the conclusion that the stay must be lifted.

The harm CU, *et al.* face is imminent. Unless the 1993 stay order is lifted, the Commission will be free to act upon AT&T's application after September 17, 1999, the date by which all filings concerning the merger must be completed. Continuing non-enforcement of the horizontal ownership rules materially affects the outcome of issues in this case, and would deny the public of statutory protection from anti-competitive abuses. Continuing uncertainty over the horizontal ownership rules also inhibits competition from existing and potential competitors.

1. The Vast Scope of AT&T's Proposed Ownership Interests Would Impede Competition and Erode the Marketplace of Ideas

When Congress mandated a limit on cable ownership concentration in 1992, the five largest MSOs reached less than half of the nation's cable subscribers. Nevertheless, even at that early point in the consolidation of the cable industry, Congress believed that "concerns raised regarding increased vertical and horizontal integration in the cable industry are *serious* and *substantial*."[17] Since that time, and most of all in recent months, cable consolidation efforts have increased dramatically. So have the concerns.

In implementing Section 533(f), the FCC determined that limiting a cable operator to interests in, at most, 30 percent of cable homes passed nationwide was necessary "to prevent the nation's largest MSOs from gaining enhanced leverage from increased horizontal concen-

[17] *Senate Report* at 43 (emphasis added).

tration."[18] Importantly, the Commission explained, "*The rule limits the extent to which large cable MSOs can merge and result in one or two MSOs controlling local cable markets nationwide.*"[19]

As Dr. Cooper shows in the attached report, AT&T, through its recent acquisition of TCI, already holds attributable interests in systems passing some 35 million homes - well exceeding the current cap for cable horizontal ownership.[20] The proposed merger between AT&T and MediaOne would dramatically add to these holdings: if approved, AT&T would control or otherwise influence cable systems serving approximately 22 million additional homes, for an apparent total of nearly 57 million homes passed, or 57% of homes passed nationwide.[21]

AT&T's proposed merger with MediaOne would not only result in an unprecedented degree of concentration in the provision of traditional cable service. The combined entity

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[18]*Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits, Second Report and Order*, 8 FCC Rcd 8565, 8577 (1993) (*"Horizontal Ownership Second Report"*).

[19]*Horizontal Ownership FNPRM* at 14478.

[20]Description of the Transaction, Public Interest Showing and Related Demonstrations, Applications for Consent to the Transfer of Control of Licenses of MediaOne Group, Inc., Transferor To AT&T Corp., Transferee, Appendix A (filed July 7, 1999) ("Public Interest Statement").

[21]Specifically, AT&T would acquire MediaOne, which serves 5 million subscribers and passes 8.5 million homes. AT&T would also acquire MediaOne's partnership interest in Time Warner Entertainment, L.P., which serves 11 million subscribers and passes 18 million homes. *Id.* at Appendix B. Not mentioned in the MediaOne application is the likelihood that AT&T may also gain an attributable interest in the 3 million homes passed (1.8 million subscribers) served by Time Warner Inc.'s cable systems, as a result of TWE's apparent management of these systems. *See* MediaOne Group 1998 Investor Handbook (as posted on MediaOne Group's website) <http://www.mediaonegroup.com/investorinfo/factbooks/98mediafactbook/investor_handbook_1998.pdf>. If so, the merger would enable AT&T to control or otherwise influence cable systems serving more than 62 million homes passed or over 65% of the homes passed nationwide.

and its web of affiliates would also have the ability and the incentive to leverage their market power into the markets for critical new broadband services. And they will enter these new markets from a position of strength as the incumbent provider of what is, in most cases, the only deployed broadband facilities.[22]

Indeed, AT&T's cable system acquisitions have positioned it as the emerging gatekeeper to the Internet, a role it appears eager to assume. Through its acquisition of TCI, AT&T has already gained control of @Home Corporation, the leading provider of Internet services and programming over the cable television infrastructure.[23] TCI's then-chairman observed, in connection with that merger, that both consumers and ISPs would "have to go through us"[24] in order to access broadband services. The press account of that statement noted that while

> [g]oing 'through us' has been cable's game . . . the Internet and satellites have diminished its gatekeeping powers. Now Malone foresees a *new gatekeeper role,* with the whole cable industry aligning with AT&T to form a single giant network. . . . @Home and [Road Runner] are poised to become *the electronic gateway to the Internet.*[25]

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[22]The typical cable system upgrade to 750 MHz digital capability "makes the network ready to carry two-way services, including advanced video, high-speed data and telephone services." MediaOne Group 1998 Investor Handbook at 11 (posted on MediaOne website) <http://www.-mediaonegroup.com/investorinfo/factbooks/98mediafactbook/investor_handbook_1998.pdf>. Given the timing of, and questions surrounding, deployment of telephone company xDSL offerings and other broadband alternatives, cable operators may enjoy an even higher degree of market power over these new broadband services in the critical early years of these new markets than they do over traditional MVPD offerings.

[23]As of June 30, 1999, @Home reportedly serves 620,000 subscribers and passes 17.0 million homes. *Excite@Home Reports Second Quarter 1999 Results*, Press Release <http://-www.home.net/news/pr_990720_01.html>.

[24]Ken Auletta, *How the AT&T Deal Will Help John Malone Get Into Your House*, The New Yorker, July 13, 1998, at 25.

[25] *Id.* (emphasis added). The CEO of @Home has echoed these sentiments, asserting that "[w]e have access to the home. If [another ISP] wants to get there with broadband, *they will have to work through us.*" He characterized the notion that another ISP could reach

Now, as a result of the proposed merger with MediaOne, AT&T would obtain MediaOne's substantial interests in that other leading cable ISP, Road Runner, as well.[26]

2. Unscrambling the Omelet

There is another important harm that the public will face if the Commission does not lift its stay.

One important difference between regulatory theory and regulatory practice is the reality that, in this age of money-driven politics, it is increasingly difficult to make deep-pocketed incumbents divest properties or otherwise adhere to newly imposed regulations which are more stringent than those under which they have operated. No better evidence of this fact is available than the pressure the Commission faced when it began to consider staff proposals for broadcast ownership rules which might have required elimination of so-called "LMAs" involving operation of two TV stations in a market. The overwhelming political heat placed upon the Commission ultimately resulted in issuance of a much less forceful decision.

Bluntly put, the same conditions pertain here. If the Commission allows new mergers to take place, it has little reason to expect that it could successfully require divestiture, much less compliance within 60 days, as is contemplated by the Commission's rules. *Horizontal Ownership FNPRM*, 13 FCCRcd at 14491.

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potential broadband customers directly with one word: "ridiculous." *Id.*

[26]Road Runner already serves approximately 320,000 customers and passes 10.4 million homes. *Road Runner Continues Strong Growth*, Press Release <http://www.rr.com/rdrun/company/press/july13299.html>. Further, AT&T is one of the top 10 Internet providers for businesses through its WorldNet unit and CERFnet. With little effort, AT&T could convert these customers to broadband as well.

E. Enforcement of the Horizontal Ownership Limits Will Advance the Public Interest

In addition to fulfilling the Congressional directive, lifting the Commission's stay will vindicate the Commission's regulatory scheme in the face of the disdainful actions of AT&T in denying that it must even purport to supply necessary information to the FCC.

The dangers to evolving competition in the video market impelled Congress to speak with great specificity as to how the FCC should intercede to protect developing video competition and to preserve the public's access to diversity. A decision to lift the stay will advance that goal.

CONCLUSION

Expedited action is requested. For the reasons stated above, CU, *et al.* will deem their administrative remedies exhausted if the Commission has not taken final action disposing of this motion by September 17, 1999.

Wherefore, CU, *et al.* ask that the Commission vacate all remaining aspects of its voluntarily imposed stay of 47 CFR §§76.503(a), (b), (c), (d), (e), and (f); that, to the extent necessary, it clarify that cable television systems are currently subject to attribution rules and policies set forth in 47 CFR §501(a); and that it grant all such other relief as may be just and proper.

Respectfully submitted,

Andrew Jay Schwartzman

Harold Feld

Cheryl A. Leanza
MEDIA ACCESS PROJECT
1707 L Street, NW
Suite 400
Washington, DC 20036
202-232-4300
Counsel for CU, *et al.*

Of Counsel:
Randi M. Albert

Law Student Intern:
Anna Medina
New York University Law School

August 17, 1999